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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

KETTLE RANGE CONSERVATION GROUP,

Plaintiff,

V.

U.S. FOREST SERVICE; GLENN
CASAMASSA, Pacific Northwest
Regional Forester, U.S. Forest Service;
RODNEY SMOLDON, Forest
Supervisor, Colville National Forest;
TRAVIS FLETCHER, District Ranger,
Republic Ranger District, U.S. Forest
Service

Federal Defendants.

Case No. 2:21-cv-00161

**FEDERAL DEFENDANTS'
MOTION AND MEMORANDUM
OF LAW IN SUPPORT OF
SUMMARY JUDGMENT AND
OPPOSITION TO PLAINTIFF'S
MOTION TO FOR SUMMARY
JUDGMENT**

February 9, 2023
With Oral Argument: 1:30 p.m.

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1 INTRODUCTION

2 Plaintiff challenges the Forest Service decisions authorizing the 2019
3 revision of the Colville National Forest’s (“CNF’s”) Forest Plan and the Sanpoil
4 Project of the CNF under the National Forest Management Act (“NFMA”) and the
5 National Environmental Policy Act (“NEPA”). Because Plaintiff’s claims are not
6 subject to judicial review and fail under the Administrative Procedure Act’s
7 (“APA’s) deferential standard of review, the Court should enter summary
8 judgment for Federal Defendants and deny Plaintiff’s motion.

9 The Forest Service revised the CNF’s 1988 Forest Plan in 2019 to respond
10 to the changed economic, social and ecological conditions that had occurred over
11 the 31-year life of the Plan and the Service’s management of the Forest. Plaintiff
12 asserts that the Forest Service acted in an arbitrary and capricious manner in
13 purportedly abandoning an “old growth standard” that existed in the Eastside
14 Screen amendment to the 1988 Plan and imposed a “bright-line rule” prohibiting
15 the harvesting of trees over 21-inches in diameter at breast height (“DBH”).

16 But to even be ripe for review under the APA, Plaintiff’s Forest Plan
17 challenge must be presented in connection with a site-specific project that includes
18 the harvesting of trees in excess of 21 inches DBH outside the parameters of the
19 Eastside screens. Because the Sanpoil Project imposes a limit on the harvesting of
20

1 trees in excess of 21 inches DBH, the Project fails to provide the requisite site-
2 specific challenge that would permit the Court to exercise APA jurisdiction.

3 Plaintiff, moreover, failed to raise its concern regarding the harvesting of
4 trees in excess of 21 inches DBH in its objections to the Forest Plan revision or to
5 the Sanpoil Project, as required by Forest Service regulations. The objection is thus
6 waived because Plaintiff failed to timely and properly raise it in the agency's
7 mandatory administrative process.

8 And even if they were justiciable, Plaintiff's Forest Plan claims would still
9 fail under the APA's deferential standard of review. The record shows that the
10 Forest Service considered six alternatives in detail, and reasonably found that
11 Alternative P resulted in a more resilient forest structure while preserving the
12 viability of wildlife species. The Forest Service's methodology is explained in the
13 record and comports with the best science, satisfying NFMA. Likewise, the Forest
14 Service disclosed the environmental effects of each alternative and responded to
15 dissenting comments raised during the public process. This satisfies NEPA, which
16 does not mandate specific results and does not require the Forest Service to value
17 the total acreage of late forest structure over fire resilient stand composition.

18 Plaintiff's challenge to the Sanpoil Project Decision Notice and Finding of
19 No Significant Impact ("FONSI", collectively "DN/FONSI") similarly fails. Based
20 on thirteen specialist reports, and after multiple opportunities for public

1 participation, including directly with Plaintiff, the Forest Service issued an
2 environmental assessment (“EA”) to assess the potential environmental effects of
3 the Project. Notwithstanding this record, Plaintiff claims that the Forest Service
4 was required to disclose tree-by-tree prescriptions for the treatments to the public.
5 But NEPA only requires that the agency explain the treatments and where they will
6 be applied. The Forest Service did just that. Indeed, the EA lists the design
7 elements and standard practices that would guide the prescriptions for
8 implementing the Project.

9 Plaintiff also contends that the Forest Service failed to assess the cumulative
10 effects of the Project when added to other past, present and reasonably foreseeable
11 projects on the Forest. Plaintiff, however, fails to even acknowledge, much less
12 address the record, including the various specialist reports that fully support the
13 agency’s conclusion that the Project will not have a significant cumulative effect.

14 Finally, Plaintiff argues that the Forest Service’s FONSI was arbitrary and
15 capricious, asserting that the Forest Service was required to prepare an
16 Environmental Impact Statement (EIS), rather than an EA, in assessing the
17 potential environmental impact of the Project. The Forest Service’s FONSI
18 determination, however, was well supported by the EA and Project record, and
19 well within the agency’s discretion to make. Plaintiff’s argument to the contrary
20 fails to even address the Project record support for the agency’s FONSI.

The Court should accordingly grant this motion, and deny Plaintiff's motion.

FACTUAL BACKGROUND

I. 2019 Revisions to the CNF Forest Plan.

Established in 1907, the Colville National Forest contains 1.1 million acres of National Forest System land in northeastern Washington. FP_113753. Before 2019, the Colville was managed under a forest plan approved in 1988. *Id.* The old Forest Plan was amended 41 times, including in 1995 when the Forest implemented the Regional Forester's Forest Plan Amendment #2, Revised Interim Standards for Timber Sales on Eastside Forests (referred to by the Forest Service as the "Eastside Screens"). FP_002978-3028. The Eastside Screens interim wildlife standard prohibited the harvest of all live trees greater than 21 inches DBH. FP_113582. It also required a historical range of variability analysis to compare current stand structure to historical conditions. *Id.*

As the official name reflects, the Eastside Screens was intended to be an interim rule. And after nearly two decades, its shortcomings were apparent. *See, e.g.*, FP_108257 (“In addition to the issues related to addressing vegetative system resiliency for late successional and old forests discussed previously, the diameter size emphasis of the Eastside Screens lacks direction for other important habitat

1 structure elements such as snags and downed logs”).¹ Most relevant here, neither
2 the 1988 Forest Plan nor the Eastside Screens account for the effects of climate
3 change, which is transforming the National Forest System. FP_108213-14.

4 In the past, frequent fires through the Colville would keep tree densities low.
5 FP_113574. But decades of fire suppression have resulted in overstocked stands
6 with higher fuel loads, leading to higher intensity wildfires. FP_113574;
7 FP_108213. Climate change is a driving factor, resulting in drier conditions and
8 longer fire seasons. FP_113574; FP_108213; *see also* FP_109738-42 (discussing
9 impacts of climate change in northeast Washington). As the years passed, the
10 Forest Service saw a growing need to manage the forest for resiliency to fire—as
11 well as diversity in stand composition and structure—to foster “ecosystems more
12 adapted to climate change.” FP_108306; *see also id.* (citing studies showing the
13 need to move toward more historic range of variability to improve forest
14 resilience).

15 So in 2019, the Forest Service replaced the 1988 Forest Plan with a new plan
16 based on the current best available science. FP_113566-628 (Record of Decision
17 (“ROD”)). In shaping the plan, the Forest Service considered sixteen alternatives,
18 advancing six to full consideration. Alternative P—the selected alternative—takes

19 _____
20 ¹ At the time of revision, the 1988 Forest Plan was well beyond the ten-to-fifteen-year plan life provided by NFMA. FP_108212.

1 a “whole landscape” approach, seeking to reach a “closer approximation of natural
2 disturbance regimes.” FP_108644. Under that approach, the Forest Service has
3 more “flexibility in responding to climate change impacts by having management
4 areas that allow a variety of management options to address unforeseen impacts.”
5 FP 108306. This flexibility includes the ability to carry out treatments in late
6 structure forest necessary to move stands toward more resilient compositions. *Id.*

7 But “more flexibility” does not mean “unlimited flexibility.” The Forest Plan
8 replaces the Eastside Screens with a new guideline for large tree management.²
9 FP_113582; FP 109776-77 (large tree management guideline). The new guideline
10 still protects late structure; “[m]anagement activities should retain and generally
11 emphasize recruitment of individual large trees (larger than 20 inches diameter at
12 breast height) across the landscape.” FP_109776. The guideline differs from the
13 Eastside Screens by allowing trees larger than 21 inches DBH to be removed in
14 limited circumstances where trees need to be removed: (1) to protect public health
15 or safety (e.g., “hazard trees”); (2) to allow a response to an emergency (e.g.,
16 wildfire response); (3) to promote or retain desired forest conditions; (4) to control
17 or limit a disease or insect infestation; (5) to protect the wildland-urban interface;
18 and (6) to promote special plant habitats. FP_109776-77.

19

20 ² The Forest Plan retains the required historical range of variability analysis.

1 The Forest Plan also protects late forest structure through desired conditions,
2 standards, and guidelines. *See, e.g.*, FP_109769-70 (desired condition to move
3 forest structure classes to the historic range of variability, including late structure);
4 FP_109802 (in northern goshawk nest stands, dominant trees should be larger than
5 15 inches DBH); FP_109797 (requiring horizontal cover to be retained where
6 vegetation types are below the historic range of variability in the Kettle-Wedge
7 Lynx Core Area). For example, all timber harvest in Inventoried Roadless Areas
8 needs to comply with the Roadless Area Rule in effect at the time project-level
9 decisions are made. FP_109777; FP_109944 (map showing roadless areas). Under
10 the current Roadless Area Rule, road construction is highly restricted with limited
11 and specific exceptions. 36 C.F.R. § 294.13. In practice, this means that most
12 roadless areas are inaccessible to any harvest, especially of late structure. Several
13 other management areas also either do not allow harvest or restrict harvest. *See,*
14 *e.g.*, FP_109872-88 (Wild and Scenic Rivers); FP_109834-41 (Backcountry);
15 FP_109851-65 (Research Natural Areas).

16 In sum, the Colville National Forest Plan seeks to promote forest structure
17 types that mimic the historic range of variability to improve forest resiliency and
18 combat the effects of climate change. The Forest Plan protects late structure
19 through the large tree management guideline and through management direction
20 that seeks to lessen the risk of loss of late structure to uncharacteristic wildfire.

1 **II. Sanpoil Project**

2 Most of the Sanpoil project area is composed of dry Douglas-fir vegetation
3 type, characterized by a mix of mostly ponderosa pine and Douglas-fir trees.
4 FP_104677. Dry Douglas-fir forests historically experienced frequent, low severity
5 fires, but the forest in the Project area has missed several fire intervals due to fire
6 suppression or exclusion efforts. AR_06873. As a result, the historically open
7 stands within the dry Douglas-fir vegetation type in the area, with their mosaic
8 pattern of tree clumps or patches and openings, have now filled in with younger
9 trees and a more uniform stand structure. AR_06888. And this has, in turn, led to
10 increased wildfire risk and decreased spatial heterogeneity across the area. *Id.*

11 Levels of insect- and pathogen-related mortality have also increased across
12 the Sanpoil area. FP_104681. Much of the risk comes from mountain pine beetle,
13 western pine beetle, Douglas-fir beetle, spruce budworm, and root diseases.
14 FP_104682. Without the Project's treatments, insects and disease would continue
15 to increase. AR_06879. Indeed, in 2012, a forest health hazard warning was issued
16 by the State of Washington, includes the Project area. FP_104682.

17 The Sanpoil Project will occur in the southern part of the Republic Ranger
18 District that borders the Confederated Tribes of the Colville Reservation ("CCT").
19 AR_06005. In July 2014, the Chairman of the CCT requested that the Forest
20 Service enter into an agreement with the CCT under the Tribal Forest Protection

1 Act (“TFPA”), which authorizes the Secretary of Agriculture to consider tribally
2 proposed projects on National Forest lands bordering or adjacent to Indian trust
3 land. AR_02491; AR_02684; AR_00794. The CCT requested to work with the
4 Forest Service in developing and implementing treatments in the Sanpoil area to
5 reduce the threat to tribal lands from catastrophic wildfire, promote forest health,
6 and begin restoration processes. AR_02266; AR_02516.

7 Acting pursuant to CCT’s request, and the request of Ferry County and
8 other parties, the Forest Service issued a December 14, 2016 scoping notice for the
9 Sanpoil Project. AR_03795. To foster conditions that are less prone to disturbance
10 events from insects, disease and wildfire, the scoping notice proposed vegetation
11 and surface fuel treatments in the Sanpoil area that would include commercial
12 thinning and commercial thinning with openings to address insects and disease;
13 pre-commercial thinning and ladder fuels reduction; landscape natural fuels
14 burning; piling and pile burning; and shaded fuel breaks along key ingress/egress
15 routes and private land boundaries to protect again wildfires. *Id.*

16 Following scoping, the Forest Service prepared detailed specialist reports
17 assessing the potential environmental effects of the Project and a no action
18 alternative, as well as five alternatives that were analyzed but not considered in
19 detail. AR_0617-18. The Forest Service published a February 6, 2019 Draft EA,
20 AR_05611.01-05611.67, and invited public comment. AR_05633. The Forest

1 Service then prepared a Final EA and Draft Decision Notice Finding of No
2 Significant Impact (“DDN/FONSI”), AR_06003-06077, AR_06323.01-06323.11,
3 and invited objections to the DDN/FONSI from the public. AR_06323.

4 After considering Plaintiff’s and other objections to the DDN/FONSI, and
5 the environmental effects identified in the EA and specialist reports, the Forest
6 Service issued its Final Decision Notice and FONSI (“DN/FONSI”), concluding
7 that the Project will not have significant effects on the quality of the human
8 environment, and thus, an EIS need not be prepared under NEPA. AR_06784-95.

9 Lastly, on January 24, 2022, the Forest Service amended the Decision
10 Notice by issuing a letter withdrawing those units, and portions of units, of the
11 Project that fall within the Lynx Analysis Units. AR_07411-7413. The Forest
12 Service determined that it was in the best interest of the government and public to
13 drop those units due to the potential loss of habitat caused by the Summit Trail fire
14 in July 2021 and to ensure compliance with the Forest-wide standards for lynx
15 habitat in the Forest Plan. AR_07412.

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STATUTORY BACKGROUND

I. National Environmental Policy Act

The purpose of NEPA is to ensure that federal agencies consider the environmental consequences of major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331; 40 C.F.R. § 1501.1³; *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

NEPA serves the twin aims of informing agency decision-makers of the environmental effects of proposed federal actions and ensuring that the public has access to relevant information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA itself “does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350. Given this focus, a “court must avoid passing judgment on the substance of an agency’s decision. Its focus must be on ensuring that agencies took a ‘hard look’ at the environmental consequences of their decisions.” *Westlands Water Dist. v. U.S. Dep’t of the Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (citing *Robertson*, 490 U.S. at 350).

³ Updated CEQ regulations became effective on September 14, 2020. Because projects that were initiated prior to September 14, 2020 could be completed using the previous version of the regulations, which is the case for the Sanpoil Project, the prior version of the regulations is cited. *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43304 (July 16, 2020).

1 NEPA requires an agency to prepare a comprehensive EIS for “major
2 Federal actions significantly affecting the quality of the human environment.”
3 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. An EIS is a detailed statement subject
4 to extensive regulations regarding format, content, and methodology. *See* 40
5 C.F.R. pt. 1502. An EIS “must consider and assess the environmental
6 consequences of the proposed action and reasonable alternatives to the action.”
7 *Westlands Water Dist.*, 376 F.3d at 865 (citing 40 C.F.R. § 1502.14). In addition to
8 direct effects, an EIS also looks at the potential cumulative effects of the proposed
9 action and reasonable alternatives considered by the agency. *See* 40 C.F.R.
10 § 1508.7.

11 Not every federal action or proposal, however, requires an EIS. An agency
12 may prepare an EA to determine whether the impacts of an action will be
13 significant, and if not, the agency may issue a FONSI and forego preparation of an
14 EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9, 1508.13. *See also Blue*
15 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.
16 1998).

17 In reviewing the sufficiency of an agency’s NEPA analysis, a court should
18 evaluate whether the agency has presented a “reasonably thorough discussion of
19 the significant aspects of the probable environmental consequences.” *California v.*
20 *Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citation omitted). “[T]he reviewing court

1 may not ‘fly speck’ an [an agency’s environmental review] and hold it insufficient
2 on the basis of inconsequential, technical deficiencies.” *Ass’n of Pub. Agency*
3 *Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1183-84 (9th Cir. 1997)
4 (citation omitted); *see also Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th
5 Cir. 1996). Further, a court may not force an agency to elevate environmental
6 concerns over other appropriate considerations, *see Stryker’s Bay Neighborhood*
7 *Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980), or “substitute its judgment
8 for that of the agency.” *Block*, 690 F.2d at 761.

9 In particular, “[f]orest management is fairly viewed as the sort of technical
10 field where courts should defer to the findings of specialized administrative
11 agencies.” *Inland Empire Pub. Lands Council v. Schultz*, 807 F. Supp. 649, 652
12 (E.D. Wash. 1992) (citation omitted). “Once satisfied that a proposing agency has
13 taken a ‘hard look’ at a decision’s environmental consequences, the review is at an
14 end.” *Block*, 690 F.2d at 761 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21
15 (1976)).

16 II. National Forest Management Act

17 “NFMA and its implementing regulations provide for forest planning and
18 management by the Forest Service on two levels: (1) forest level and (2) individual
19 project level.” *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th
20 Cir. 2012). The Forest Service first develops a forest plan containing “broad, long-

1 term plans and objectives for the entire forest.” *Id.* These plans “must provide for
2 multiple uses” of forest resources. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305
3 F.3d 957, 961 (9th Cir. 2002) (citing 16 U.S.C. § 1604(e)(1)). The agency then
4 implements the forest plan through site-specific projects. *Weldon*, 697 F.3d at
5 1056.

6 “While NFMA requires that the proposed site-specific actions be consistent
7 with the governing Forest Plan, the Forest Service’s interpretation and
8 implementation of its own forest plan is entitled to substantial deference.” *Id.*
9 (citing *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir.
10 2003)). “In the face of ambiguity, [courts] ‘defer to the Forest Service’s reasonable
11 interpretation of the Forest Plan’s requirements.’” *All. for the Wild Rockies v.*
12 *Bradford*, 856 F.3d 1238, 1242 (9th Cir. 2017) (quoting *Ecology Ctr. v. Castaneda*,
13 574 F.3d 652, 661 (9th Cir. 2009)).

14 This degree of deference is consistent with the intent of NFMA to “provide
15 effective guidance . . . but [to] allow enough flexibility so that the professional
16 foresters can do the job, rather than lawyers and judges.” Forest and Rangeland
17 Management: Joint Hearings on S. 2851, S. 2926, S. 3091 Before the Subcomm.
18 on Env’t of the Comm. on Agric. and the Subcomm. on the Env’t of the Comm. on
19 Interior, 94th Cong., 2d Sess. 262 (1976). “Congress has consistently
20 acknowledged that the Forest Service must balance competing demands in

1 managing [NFS] lands [and], since Congress' early regulation of the national
2 forests, it has never been the case that the national forests were . . . to be 'set aside
3 for non-use.'" *The Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008)
4 (third alteration in original) (internal quote and citation omitted), *abrogated on*
5 *other grounds by Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir.
6 2020).

7 **STANDARD OF REVIEW**

8 NFMA and NEPA do not supply a separate standard of review. The APA
9 standard of review thus applies for claims under these statutes. *San Luis & Delta-*
10 *Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA,
11 a court may set aside agency action found to be "arbitrary, capricious, an abuse of
12 discretion, or otherwise not in accordance with law" or "in excess of statutory
13 jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §
14 706(2)(A), (C).

15 An agency action is arbitrary and capricious only where the agency "relied
16 on factors Congress did not intend it to consider, entirely failed to consider an
17 important aspect of the problem, or offered an explanation that runs counter to the
18 evidence before the agency or is so implausible that it could not be ascribed to a
19 difference in view or the product of agency expertise." *League of Wilderness*

Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1215 (9th Cir. 2008) (internal quote and citation omitted).

This standard is a “highly deferential” one—and requires a reviewing court to consider only “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Jewell*, 747 F.3d at 601 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Forest Service’s judgments “often require trade-offs among worthy objectives . . . Congress left such judgments to a politically responsive agency with relevant expertise.” *In re Big Thorne*, 857 F.3d 968, 976 (9th Cir. 2017). Courts reviewing agency decisions, moreover, are limited to the administrative record lodged with the Court. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

ARGUMENT

14 Plaintiff's motion addresses summary judgment on its Forest Plan challenge
15 in the Fifth Claim of the Amended Complaint, and the challenges to the Sanpoil
16 DN/FONSI in the First, Third, and Fourth Claims of the Complaint.⁴ Because the

⁴ Plaintiff’s motion makes no argument regarding the Second Claim, which asserted that the Forest Service failed to consider a reasonable range of alternatives in the Sanpoil Project’s EA. Nor does Plaintiff’s motion present any argument regarding the Sixth Claim, which sought to argue that the Forest Service’s approval of the Project violated the Endangered Species Act (“ESA”). These claims are thus waived. See *Native Ecosystems Council v. Marten*, No. CV 17-47-M-DLC-JCL, 2018 WL 3630132, at *7 (D. Mont. July 31, 2018) (“The Ninth Circuit has stated

1 Forest Service complied with NFMA, NEPA, and the APA in revising the Forest
 2 Plan and in issuing the DN/FONSI for the Sanpoil Project, the Court should grant
 3 judgment to Federal Defendants, and deny Plaintiff's motion in its entirety.

4 **I. Plaintiff's Forest Plan Challenge is Not Ripe for Review.**

5 Before a forest plan challenge can even be subject to APA review, it must be
 6 presented in the context of a challenge to a "site-specific" project that implicates
 7 the practices or provisions of the plan challenged. *Ohio Forestry Ass'n v. Sierra*
 8 *Club*, 523 U.S. 726, 734 (1998). The APA does not permit review of non-discrete
 9 "agency action" that is not tied to a party's alleged harm. *See Neighbors of Cuddy*
 10 *Mountain v. Alexander*, 303 F.3d 1059, 1067 (9th Cir. 2002) (citing *Lujan v. Nat'l*
 11 *Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). Thus, Plaintiff's Forest Plan challenge
 12 is only "'ripe' for judicial review under the APA . . . [when] the scope of the
 13 controversy [alleged by a party] . . . and its factual components [are] fleshed out,
 14 by some concrete action applying the [controversy] in a fashion that harms or
 15 threatens to harm [it]."*Lujan*, 497 U.S. at 891.

16 Plaintiff's Forest Plan challenge seeks to challenge the 2019 Forest Plan
 17 revisions on the ground that the revised plan permits the harvesting of trees in
 18 excess of 21-inches DBH, in alleged violation of NEPA and NFMA. *See* Pl.'s Mot.

19
 20 time and time again, that a litigant waives an issue by failing to address it in its
 opening brief"), aff'd in part and remanded sub nom. *All. for the Wild Rockies v.*
Marten, 789 F. App'x 583 (9th Cir. 2020)

1 for S.J. (“Pl.’s S.J.”) at 1-2, 9-24, ECF No. 48. Recognizing that it must bring its
2 Forest Plan challenge in a Project that implicates these provisions and practice,
3 Plaintiff asserts that the Court has APA jurisdiction because the Sanpoil Project
4 “hinges” on the cutting of trees in excess of 21-inches DBH. Pl.’s S.J. at 8 (quoting
5 *Neighbors of Cuddy Mountain*, 303 F.3d at 1067). That assertion is without basis.

6 The Sanpoil EA explains that the Project targets *smaller* less vigorous trees
7 and those infested by pathogens for commercial thinning. AR_06019. The Final
8 Silviculture Report thus explains that “project activities would *retain* and generally
9 emphasize recruitment of individual large trees (larger than 20 inches diameter at
10 breast height) across the landscape, because silvicultural prescriptions would be
11 implemented to reduce the losses of large trees to disturbances, and would include
12 a *diameter limit of 21 inches DBH.*” AR_06897 (emphasis added). “If any trees
13 larger than 20 inches DBH and less than 21 inches DBH are removed [under the
14 Project], it is because they would meet one” of certain limited exceptions,
15 including when it is necessary to protect public health or safety or to control or
16 limit the spread of insect infestation. *Id.* Because the Sanpoil Project thus does not
17 implicate the Forest Plan provisions Plaintiff challenges here, the Court lacks APA
18 jurisdiction to review that challenge. The challenge fails for that reason alone.

1 **II. Plaintiff's Forest Plan Challenge was also Waived.**

2 Furthermore, nowhere in Plaintiff's objections to the Forest Plan revisions or
3 to the DN/FONSI for the Sanpoil Project did it raise its concern regarding the
4 harvesting of trees in excess of 20 inches DBH or the removal of the Eastside
5 Screen Standard. *See FP-106561-575; FP_106591-598; AR_06376-94.*

6 The objection is thus waived. "Persons challenging an agency's compliance
7 with NEPA must 'structure their participation so that it . . . alerts the agency to the
8 [party's] position and contentions,' in order to allow the agency to give the issue
9 meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764
10 (2004) (first alteration in the original) (quoting *Vt. Yankee Nuclear Power Corp.*,
11 435 U.S. at 553).

12 The Forest Service provides a robust administrative process for public
13 engagement through the NEPA process, consistent with its regulations. 36 C.F.R.
14 Part 218 (establishing Forest Service pre-decisional administrative review
15 process); 36 C.F.R. Part 219 (establishing Forest Service administrative review
16 process for plan amendments and revisions). Statute and Forest Service regulation
17 thus both require administrative exhaustion. *See 7 U.S.C. § 6912(e)* ("[A] person
18 shall exhaust all administrative appeal procedures established by the
19 Secretary...."); 36 C.F.R. § 218.13 (reiterating statutory exhaustion requirement).
20 So that the Forest Service may understand, evaluate, respond, and document its

1 response to objections in the Administrative Record, Forest Service regulations
2 require that a party file an “objection.” 36 C.F.R. §§ 218.1-218.15.

3 By failing to raise its concerns during the administrative process, Plaintiff
4 “forfeited any objection” that was not raised in the agency’s mandatory objection
5 process. *Pub. Citizen*, 541 U.S. at 764; *see also Forest Guardians v. U.S. Forest*
6 *Serv.*, 641 F.3d 423, 431 (10th Cir. 2011) (recognizing that Plaintiff must exhaust
7 under 7 U.S.C. § 6912(e) before bringing claims in federal district court); *Native*
8 *Ecosystems Council v. Kimbell*, No. CV 04-127-M-DWM, 2006 WL 8430971, at
9 *10-11, (D. Mont. Aug. 29, 2006) (recognizing that party is barred from pursuing
10 claims not raised in administrative process); *Native Ecosystems Council v.*
11 *Lannom*, No. CV 21-22-M-DWM, 2022 WL 1001493, at *-3-5, (D. Mont. April 4,
12 2022) (same), *amended*, No. CV 21-22-M-DWM, 2022 WL 2309011 (D. Mont.
13 Apr. 25, 2022). Thus, even if the Court were to find Plaintiff’s challenge ripe for
14 review (which it is not), the challenge should be rejected for this additional reason.

15 **III. Plaintiff’s Forest Plan Challenge also Fails on its Merits.**

16 Even if, however, Plaintiff could overcome these hurdles, its Forest Plan
17 challenge fails on the merits. Through NFMA, Congress entrusted the Forest
18 Service to manage multiple use of resources in a combination that best meets the
19 public interest. *See* 16 U.S.C. § 529 (directing Secretary of Agriculture to
20 administer the National Forest System for multiple uses and sustained yield). The

1 Forest Service balances the scales through the development, revision, and
2 amendment of forest plans. *Id.* § 1604(e)(1) (requiring forest plans to “provide for
3 multiple use and sustained yield of the products and services obtained therefrom in
4 accordance with the Multiple-Use Sustained-Yield Act of 1960.”). NFMA allows a
5 forest plan to be amended “in any manner whatsoever after final adoption.” *Id.*
6 § 1604(f)(4). In doing so, the Forest Service enjoys broad discretion to meet its
7 multiple use mandate. *See Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404-
8 05 (9th Cir. 1996) (upholding regional plan amendment in part because of the
9 “inherent flexibility of the NFMA”).

10 As described above, the Forest Service adopted the 2019 Forest Plan to
11 promote diverse, fire and disease resistant stands and to move forest conditions
12 toward the historic range of variability. Over the past twenty years, uncharacteristic
13 wildfires have been the leading cause of the loss of late forest structure on National
14 Forest System lands in the West. Late forest structure on the Colville is imperiled.
15 FP_108373-74 (describing stand conditions with heavy fuel loads and dense
16 canopies, “increase[ing] potential for fire transmission and spread”); *id.* (“the
17 potential for high-severity fire in late forest structure is particularly concerning
18 because the Forest has considerably less old forest and associated habitat on the
19 landscape than would have historically occurred. This lack of landscape
20 redundancy in late forest structures means that even moderate acreage loss due to

1 fire events would further exacerbate the imbalance of forest structures.”);
2 FP_103327 (“Since the mid-1980s, the size and intensity of large wildfires in the
3 western United States have increased markedly (Westerling et al. 2006), due, in
4 part, to a reduction in fuel moisture driven by increased temperature and lower
5 snowpack.”). The selected alternative—Alternative P—calls for strategic
6 treatments that seek to alter landscape-scale fire behavior and reduce the loss of
7 late structure forest. FP_108751

8 That decision is documented in the Forest Service’s record, particularly the
9 Wildlife Report, FP_03197-362; the Final EIS, FP_108184-9721, the Forest Plan,
10 FP_109722-71, and the Record of Decision for the Forest Plan, FP_113566-628.
11 Plaintiff briefs three claims against the Forest Plan: (1) a NFMA challenge to the
12 Forest Service’s analysis of habitat for surrogate species, Pl.’s S.J. at 17-18; (2) a
13 NEPA challenge to the Forest Service’s conclusion that Alternative P best
14 promotes viability for surrogate species, *id.* at 18-21; and (3) a NEPA challenge to
15 the Forest Service’s response to comments submitted during the public
16 participation process, *id.* at 21-23. Even if these claims were considered, each
17 fails.

18 **A. The Forest Service’s Surrogate Species Methodology is Supported
19 by the Best Available Science.**

20 Under the 1982 planning rule, the Forest Service needed to designate
management indicator species to monitor the potential effects of major forest

1 management activities. FP_000220-21 (1982 Planning Rule section 219.19 Fish
2 and Wildlife Resource). The Forest Service did so here, designating four
3 management indicator species on the Colville: (1) the MacGillivray's warbler, for
4 grazing and understory effects; (2) the black-backed woodpecker, for post-fire
5 salvage harvest; (3) the northern goshawk, for forest vegetation management; and
6 (4) the white-headed woodpecker, for forest vegetation management. FP_109794.
7 But over the more than two decades that have passed since adoption of the old rule,
8 the use of management indicator species has been questioned. *See* FP_108142
9 (citing studies).

10 In the 1990s, the management indicator species concept evolved into the
11 more robust concept of surrogate species. *Id.* (citing Lambeck (1997)). Following
12 the best available science, the Forest employed “an eight-step process . . . to assess
13 the ecological conditions capable of sustaining viable populations of terrestrial
14 wildlife species”:

15 (1) identification of species of concern, (2) description of source
16 habitats, and other important ecological factors, (3) organizing species
17 into groups, (4) selection of surrogate species for each group, (5)
18 development of surrogate species assessment models, (6) application of
the surrogate species assessment models to evaluate current and
historical conditions (7) development of conservation strategies, and
(8) designing monitoring and adaptive management.

19 FP_103206 (citing Suring et al. (2011) and Gaines et al. (2017)); *see also* FP_
20 103342-51 (Wildlife Report references). The Forest Service identified 209 species

1 of concern, aggregated into 10 families and 28 groups based on habitat
2 associations. *Id.* From that list, the Forest Service chose 26 surrogate species to
3 evaluate each alternative’s effects on habitat on the Colville. *Id.*

4 The Forest Service’s method of analysis—detailed in Suring et al. (2011)
5 and Gaines et al. (2017)—is summarized in the Wildlife Report. FP_103212-16;
6 *see also* FP_113600 (ROD discussing method for meeting NFMA’s diversity and
7 viability requirements). The surrogate species assessment process was used to set
8 the baseline and evaluate each alternative. FP_103212. For each species, “broad-
9 scale viability assessments were done across the species’ range that occurred in
10 Northeast Washington assessment area.” *Id.* To estimate how each alternative
11 would impact habitat, future trends were modeled at 20, 50, and 100 years for the
12 American marten, white-headed woodpecker, northern goshawk, pileated
13 woodpecker, black-backed woodpecker, and Lewis’s woodpecker. *Id.*; *see also*
14 FP_103356. “Other risk factors that influence the viability of surrogate species
15 were assessed in the short term (<20 years) using the Objectives and the long term
16 (<50 years) using the Desired Conditions to estimate how alternatives might
17 contribute to the viability of surrogate wildlife species.” *Id.*; FP_108672 (risk
18 factors); *see also* FP_103354 (chart summarizing viability findings).

19 Each alternative was evaluated by reference to six key indicators, shown in
20 Table 6 in the Wildlife Report. FP_103214-15. The conclusions are summarized in

1 Table 7, FP_103215-16, and detailed in the body of the Wildlife Report.
2 FP_103216-341 (discussing the effects of each alternative). These scientific
3 conclusions receive the highest level of deference. *See The Lands Council*, 537
4 F.3d at 993 (courts are at their “most deferential” when the agency is ‘making
5 predictions, within its [area of] special expertise, at the frontiers of science.’
6 (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir.
7 2003)) (alterations in original).

8 As Plaintiff admits, the Forest Service may use habitat as a proxy for the
9 viability of a species. Pl.’s S.J. at 17; 36 C.F.R. § 219.14(f) (2005); *The Lands*
10 *Council*, 537 F.3d at 998 (“We will defer to its decision to use habitat as a proxy
11 unless the Forest Service makes a ‘clear error of judgment’ that renders its decision
12 arbitrary and capricious.”). Plaintiff dismisses the reasoned analysis in the Wildlife
13 Report as a “subjective evaluation.” Pl.’s S.J. at 17-18. But the Forest Service’s
14 methodology used the best available science, satisfying NFMA. *See The Lands*
15 *Council*, 537 F.3d at 994, 996 (upholding analysis supported by studies the Forest
16 Service found reliable); *see also id.* at 998 (Forest Service must describe the
17 quantity and quality of habitat necessary to support viability of species);
18 FP_108670 (showing viability outcomes for surrogate species); FP_103356-58
19 (showing modeled habitat for surrogate species); FP_109770 (Table 5 showing
20

1 forest structure under desired historic range of variability). Plaintiff's NFMA
2 claim fails and this Court should grant summary judgment for the Forest Service.

3 **B. The Selected Alternative Promotes Diversity by Cultivating More
4 Resilient, Functional Late Structure.**

5 After analyzing the effects of each alternative, the Forest Service concluded
6 that the selected alternative best promotes the viability of the surrogate species.
7 FP_108680 (chart summarizing each alternative's contribution to viability). The
8 Wildlife Report explains why. FP_103326-28. Strategic treatments will move fire
9 conditions back toward historic levels, reducing the risk of losing late structure to
10 uncharacteristic wildfire. FP_103326. Restoration treatments would result in
11 "multi-layered habitat patches tailored to specific conditions and surrogate species
12 . . . managed within or toward the historic range of variation for each landscape."

13 *Id.*

14 Plan components would improve late structure habitat, including by
15 retaining snags and prohibiting the cutting of large trees outside of narrow
16 exceptions. *See* FP_103327. Road closures and limits on road density would also
17 protect late structure habitat. *Id.* This dynamic-landscape restoration approach
18 seeks to move the forest toward conditions resilient against the environmental
19 changes brought about by climate change. FP_103327-28; *see also* FP_103327
20 ("Climate-driven changes in fire regimes would likely be the dominant driver of

1 changes to forests and LSOF habitats in the western United States over the next
2 century (McKenzie et al. 2004)”).

In sum, the Forest Service found that the selected alternative provides the most protection for the surrogate species by providing for resilient landscapes, conserving late structure across the entire forest, and by reducing man-made disturbances. FP_103328. Plaintiff takes a more myopic view, arguing that other alternatives that provide for more total late structure are better. Pl.’s S.J. at 18-20. But the Forest Service found Alternative P was more beneficial because it results in the “highest percentage of total late forest structure in late open, which is expected to result in increased resilience of late forest habitats.” FP_108323. That conclusion is reasonable and supported by the Forest Service’s analysis.

12 Plaintiff may prefer an approach that prizes the number of large trees over
13 other factors. But the Forest Service is prioritizing moving stands toward more
14 resilient conditions that can withstand climate change-driven wildfire. That
15 decision is supported by the record; it is not arbitrary or capricious. And that is all
16 that NEPA requires. *See* 40 C.F.R. § 1502.14; *Balt. Gas & Elec. Co. v. Nat. Res.*
17 *Def. Council*, 462 U.S. 87, 97 (1983).

18 **C. The Forest Service Considered and Responded to Public Comment.**

NEPA requires agencies to “disclose, discuss[,] and respond to all responsible opposing views at appropriate points in Draft and Final documents.”

1 40 C.F.R. § 1502.9; *accord The Lands Council*, 537 F.3d at 1001 (“The Forest
2 Service must acknowledge and respond to comments... that raise significant
3 scientific uncertainties and reasonably support that such uncertainties exist.”).
4 The Forest Service sought and received comments throughout the NEPA process.
5 FP_017046-194 (scoping comments); FP_109231-454 (responses to comments on
6 the EIS). And the Forest Service’s references show that the agency considered
7 sources cited in comment letters. *See, e.g.*, FP_109036 (considering Hessburg,
8 Smith, and Kreiter et al. (1999)); FP_1087567 (same); FP_109036 (considering
9 Hessburg and Agee (2003)); FP_109031 (considering Franklin and Johnson
10 (2012)).

11 Plaintiff challenges the sufficiency of the Forest Service’s responses to
12 comments objecting to the replacement of the Eastside Screen’s prohibition on
13 removing trees 21 inches DBH or larger with the large tree guideline. Pl.’s S.J. at
14 22-23. This issue was explored in the Final EIS. *See, e.g.*, FP_108491-92
15 (discussing the need to move forest back toward historic range of variability);
16 FP_108319 (listing studies supporting the need to move landscape back toward
17 heterogeneity through silvicultural treatments); FP_099811 (discussing effects of
18 maintaining the Eastside Screens rule); FP_099820 (same); FP_099829 (same).
19 NEPA does not require an agency to publish “every comment . . . in the final EIS.
20 Nor must an agency set forth at full length the views with which it disagrees.”

1 *Block*, 690 F.2d at 773. The Final EIS for the Forest Plan reasonably explains why
2 the Forest Service chose to move away from the inflexible Eastside Screens to a
3 dynamic approach. NEPA requires no more.

4 Because the Eastside Screens Panel report was not included in the
5 administrative record, Plaintiff argues that the Forest Service “did not even
6 consider the rationale for the 21-inch rule” and “fail[ed] to maintain the ‘scientific
7 integrity’ of its analysis.” Pl.’s S.J. at 23. The Colville National Forest has
8 extensive experience implementing the Eastside Screens, which it has applied to
9 every project for the last 25 years. The rationale for adopting the Eastside Screens
10 is discussed in the interim management direction itself, FP_002978-003028, in the
11 Record of Decision for the Plan FP_113582, and in the Final EIS, FP 108257-59.
12 The Final EIS also references several other documents considering the Eastside
13 Screens in depth. FP_109067-68 (citing documents including a 1995 EA for
14 continuation of the Eastside Screens). The Forest Service understood the Eastside
15 Screens, including their limitations. The decision to move away from their rigid
16 and outdated approach and toward a dynamic landscape approach was well-
17 reasoned and satisfies NEPA. *See N. Alaska Env’tl Ctr. v. Kempthorne*, 457 F.3d
18 969, 975 (9th Cir. 2006) (judicial review under NEPA limited to “whether the
19 agency adequately considered a project’s potential impacts and whether the
20

1 consideration given amounted to a ‘hard look’ at the environmental effects.”
2 (citation omitted)).

3 In short, Plaintiff’s challenge is not ripe, was waived, and fails in any event
4 under NFMA, NEPA—and the APA. Federal Defendants are accordingly entitled
5 to summary judgment on Plaintiff’s Forest Plan challenge in Claim Five.

6 **IV. The Forest Service Disclosed and Took a “Hard Look” at the
7 Potential Environmental Effects of the Sanpoil Project.**

8 Plaintiff’s challenge to the DN/FONSI authorizing the Sanpoil Project
9 likewise fails. Pl.’s S.J. at 23-40. The Forest Service complied with NEPA in
10 disclosing the Project’s treatments, assessing the cumulative effects of the Project,
11 and in issuing the FONSI after taking a “hard look” at the potential environmental
12 effects of the Project. Plaintiff’s arguments to the contrary rest on arguments that
13 misapprehend NEPA and ignore the Project record supporting the DN/FONSI.

14 **A. The Forest Service Disclosed the Project’s Treatments.**

15 NEPA requires that the Forest Service explain which “treatments will be
16 applied in which areas and to what extent” in the project area. *Navickas v. Conroy*,
17 575 F. App’x 758, 760 (9th Cir. 2014). The EA for the Project discloses that
18 information: The EA both explains and defines the Project’s silvicultural and fuels
19 treatments. AR_06019-22. The EA also explains where the treatments will be
20 applied and the extent of those treatments; it also includes unit-by-unit maps

1 showing where treatments will occur. AR_06023-25. In addition, the EA includes
2 maps showing the temporary roads that will be built to permit the silvicultural and
3 fuels treatments—and the planned road closures that are necessary to complete the
4 Project. AR_06027-28. Appendix C of the EA, moreover, cross-references to each
5 of the corresponding unit maps to explain the treatments that will be applied in
6 each of the units in the area. AR_06073-06077 (Appendix C Unit Treatment
7 Table); AR_06024-06025 (maps indicating corresponding units). Finally, the EA
8 spells out the site-specific design elements and standard practices for the
9 treatments that will guide the Forest Service’s implementation of the Sanpoil
10 Project. AR_06030-37 (design elements); AR_06069-73 (standard practices).

11 Despite the EA’s detailed disclosures, Plaintiff maintains that the Forest
12 Service must go further. Plaintiff contends that NEPA requires that the Forest
13 Service must explain “how the units on the Project map would look after harvest,
14 what diameter trees would be logged in each unit, how many trees would be cut
15 down or burned in each location, when different treatments would occur relative to
16 each other, what the spacing would be between the trees that remain, [and] how
17 many of these treatments would vary in and across single units.” Pl.’s S.J. at 34.

18 NEPA does not impose this obligation. The Service has “no obligation
19 [under NEPA] to identify the specific trees that would be removed as part of the
20 Project.” *Navickas*, 575 F. App’x at 760. NEPA instead permits an agency to

1 “select treatment units based on changing on-the-ground conditions.” *WildEarth*
2 *Guardians v. Conner*, 920 F.3d 1245, 1258 (10th Cir. 2019). Plaintiff’s argument
3 to the contrary rests upon *SE Alaska Conserv. Council v. United States Forest*
4 *Service (“SACC”)*, 443 F. Supp. 3d 995 (D. Alaska 2020). Pl.’s S.J. at 33. But the
5 district court there ruled the Forest Service erred by not explaining in the Project
6 EIS “when and where the harvest activities or road construction” authorized would
7 occur under the project. *Id.* at 1009. Here, that is not at issue because the EA
8 thoroughly explains “when and where” Project treatments will occur.

9 *SACC*, moreover, involved a challenge to an EIS for a project that used
10 condition-based management (“CBM”). Under CBM, the agency identifies
11 conditions that characterize the types of sites on which certain management
12 activities could occur but does not disclose where treatments will occur. *SACC*,
13 443 F. Supp. 3d at 1000. The Sanpoil Project does not use CBM; rather, the Project
14 involves the more traditional approach to project development and NEPA used in
15 cases such as *WildEarth Guardians*, 920 F.3d at 1250-51, 1257-58, where the
16 agency identifies when and where treatments and other projects will occur—and
17 then analyses the potential environmental effects of those activities. *SACC* is thus
18 inapposite.

19 Plaintiff also maintains that the Project’s treatments are too vaguely
20 described in the EA and Project record. Pl.’s S.J. at 23-24. Plaintiff contends, for

1 example, that the Silviculture Report fails to explain how the Project will address
2 the cutting of trees in excess of 21-inches DBH and tree openings. *Id.* at 24. To the
3 contrary, the Report clearly explains that the Project would “retain” and
4 “emphasize recruitment of individual large trees (larger than 20 inches diameter at
5 breast height) across the landscape.” AR_06897. The Report also explains the
6 Project would limit the cutting in excess of 21 inches DBH absent one of the
7 narrow exceptions. *Id.* The Report also addresses tree openings: Table 7 to the EA
8 explains the openings, referencing the Douglas-fir, Northern Rocky Mountain
9 mixed conifer, Subalpine fir/Lodgepole pine, and Spruce/Subalpine fir and how
10 each would be maintained in relation to each species historic range of variability.
11 AR_06038. The Silviculture Report, moreover, explains how the Forest’s overall
12 structure, including tree openings, would be impacted by the Project. AR_06895-
13 96.

14 Plaintiff also complains that the EA describes the Project treatments in
15 “vague, general terms.” Pl.’s S.J. at 34-35. But Plaintiff’s complaint lies not with
16 the EA’s definitions, which are very detailed. AR_06019-20. Plaintiff’s complaint
17 is instead that the definitions give the Forest Service latitude to craft implementing
18 prescriptions to suit on-the-ground conditions. *See* Pl.’s S.J. at 35 (referencing use
19 of terms such as “may” or to the “extent feasible” in describing the treatments).
20 However, as explained above, NEPA permits the Forest Service to develop

1 prescriptions that suit on-the-ground conditions when it implements a project.

2 *Navickas*, 575 F. App'x at 760; *WildEarth Guardians*, 920 F.3d at 1258.⁵

3 Plaintiff also speculates that the EA's description of the treatments could be
 4 read to permit "large clearcuts of healthy forest[.]" Pl.'s S.J. at 34. The Project
 5 record, however, states that "[t]here are no activities planned as part of the Sanpoil
 6 project that include a . . . clearcut harvest of even-aged stands." AR_06897.

7 Plaintiff likewise complains that the maps showing the temporary roads that
 8 will be constructed under the Project do not show the roads that will be restored. Pl.'s
 9 S.J. at 35. However, that information, too, is prominently displayed in the record.

10 See AR_06684 (Sanpoil Project Non-system Road Templates).

11 Lastly, Plaintiff contends that the Forest Service failed to disclose the
 12 additional grazing that will occur in the Quartz allotment in the Sanpoil area,
 13 (which, Plaintiff asserts will adversely impact sensitive species, such as gray
 14 wolves). Pl.'s S.J. at 35-36, *see also id.* at 28-29. The Project, however, will not
 15 result in additional grazing in the allotment. By thinning stands and creating
 16 openings in the forest canopy in the Quartz allotment, the Project would produce
 17 better, not more, grazing area in the allotment. AR_05491. The EA thus states that
 18

19 ⁵ The discussion found in the EA at AR_06037, AR_06056 and AR_06010-11 that
 20 Plaintiff references is consistent with that practice. Pl.'s S.J. at 37. There the EA
 explains how the on-the-ground treatments would be implemented in accordance
 with Forest Plan and Roadless Area Conservation Rule requirements.

1 the improved foraging habitat that will result from the Project's treatments would
2 "add 10,585 *capable* acres to the Quartz allotment." AR_06054 (emphasis added).

3 The Court should, accordingly, reject Plaintiff's arguments and grant Federal
4 Defendants summary judgment on Claim One of the Amended Complaint that rest
5 upon these arguments. To the extent Plaintiff's arguments can be read to also
6 contend that the Forest Service violated NFMA, moreover, as pled in Claim Four
7 of the Amended Complaint, those claims should also be rejected for the same
8 reason.⁶

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13 ⁶ Plaintiff references the Final Silviculture Report's discussion of Forest-Wide
14 Components, including each of the components of the Plan and how the Project
15 complies with the Plan's desired conditions, objectives, and standards. Pl.'s S.J. at
16 36. Although not argued as such, Plaintiff appears to be making a NFMA argument
17 that the Project fails to adhere to the "Scenic Integrity Objectives" of the Plan. If
18 so, that argument fails. Under the Forest Plan, "a project or activity is consistent
19 with the objectives of the plan in it contributes to or does not prevent the
20 attainment of any applicable objectives." FP_109904-05. In evaluating a project or
activity, the Forest Service "should identify any applicable objective(s) to which
the project contributes and document that the project does not prevent the
attainment of any objectives." *Id.* Appendix D to the Forest Plan sets forth the
Scenic Integrity Objectives. FP_109928-109929. Here, the Forest Service
considered those objectives. See AR_06493, AR_06495 (maps of Sanpoil scenic
integrity objectives). And in the Scenic Resources Report, the Forest Service
explained both how the Project adheres to the scenic standards and follow
guidelines to meet objectives. AR_06651-06669.

1 **B. The Forest Service Assessed the Cumulative Effects of the**
2 **Project.**

3 Plaintiff's challenge to Forest Service's cumulative effects analysis for the
4 Project similarly fails. Pl.'s S.J. at 25-32. NEPA requires that agencies assess the
5 direct and indirect effects as well as the cumulative impact of their actions on the
6 environment. 40 C.F.R. §§ 1502.16, 1508.25(c). Direct effects are those "caused
7 by the action and occur[ing] at the same time and place." 40 C.F.R. § 1508.8(a).
8 Indirect effects are those "caused by the action and are later in time or farther
9 removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).
10 A "cumulative impact" of an action is defined as "the impact on the environment
11 which results from the incremental impact of the action when added to other past,
12 present, and reasonably foreseeable future actions regardless of what agency
13 (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R.
14 § 1508.7.

15 To establish a NEPA violation based on the agency's cumulative effects
16 analysis, a plaintiff must show that the agency did not provide "a useful analysis"
17 of those effects. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d
18 1067, 1076 (9th Cir. 2011) (internal quote and citations omitted). A useful analysis
19 includes "some quantified or detailed information." *Id.* "Courts accord substantial
20 deference to an agency's determination of the scope of its 'cumulative effects'

1 review.” *Cascadia Wildlands Project v. U.S. Forest Serv.*, 386 F. Supp. 2d 1149,
2 1167 (D. Or. 2005) (citing *Neighbors of Cuddy Mountain*, 303 F.3d at 1071).

3 Here, the EA assesses the potential direct, indirect, and cumulative effects of
4 the Project and the no action alternative. AR_06037-06058. In particular, the EA
5 describes the potential effects on a wide range of natural and human resources. *See*
6 AR_06037-38 (potential effects to forest vegetation); AR_06039-40 (potential
7 effects to air quality, fire risk, and forest health); AR_06040-42 (potential effects
8 to aquatics); AR_06042-52 (potential effects to wildlife, including threatened or
9 endangered species); AR_06053-54 (potential effects to soil); AR_06054 (potential
10 effects to range); AR_06054-55 (potential effects to special uses and minerals);
11 AR_06055 (potential effects to cultural and heritage resources); AR_06055-56
12 (potential effects to botany); and AR_06056-57 (potential effects to recreation).

13 However, an EA is by design a “concise public document” that “[b]riefly
14 provide[s] sufficient evidence and analysis for determining whether to prepare an
15 [EIS] or finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1). Thus, the full
16 discussion of the potential effects of the Project is in the Forest Service’s specialist
17 reports in the Project record. *See* AR_06037 (Forest Service advised public in EA
18 that “[c]omplete reports are incorporated by reference and available on project file”
19 on Forest Service website); *see also* AR_04220-04251 (Vegetation Management
20 Report); AR_04252-04283 (Soils Report); AR_05192-05203 (Invasive Plants

1 Report); AR_05217-05232 (Botany Report); AR_05233-05252 (Recreation
2 Report); AR_06206-06222 (Range Report); AR_06866-06904 (Silviculture
3 Report); AR_05317-05346 (Fire, Fuels, and Air Quality Report); AR_05464-
4 05487 (Effects to Management Indicator Species and Landbirds); AR_05608-
5 05611 (Roads Report); AR_06152-06183 (Watershed Fisheries-Hydrology
6 Report); AR_06275-06322 (Biological Evaluation for Terrestrial Wildlife);
7 AR_0653-06274 (Additional Terrestrial Wildlife Analysis Final), and AR_06918-
8 06928 (Sanpoil Vegetative Management Project Lynx Analysis Supplement).

9 **1. The Forest Service Assessed the Effects on Recreation.**

10 Despite the robust analysis of the effects of the Project in the record,
11 Plaintiff asserts that the Forest Service failed to assess the cumulative effects of the
12 Project on recreation. Pl.’s S.J. at 27. But the EA explains the cumulative effects of
13 the Project on recreation, AR_06067-68, as does the recreation report in the record.
14 AR_05250.

15 Indeed, Plaintiff does not challenge the analysis. Plaintiff instead seeks to
16 argue that the EA’s discussion of the cumulative impacts of the Project on
17 recreation is deficient because it fails to catalogue other past projects on the Forest.
18 Pl.’s S.J. at 27. The Forest Service’s NEPA regulations, however, do not require
19 that an agency “catalogue or exhaustively list and analyze all individual past
20 actions.” 36 C.F.R. § 220.4(f). Nor do the regulations “require the consideration of

1 the individual effects of all past actions to determine the present effects of past
2 actions.” *Id; see also League of Wilderness Defenders–Blue Mountains*
3 *Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir.2008)
4 (“[A]gencies are not required to list or analyze the effects of individual past actions
5 unless such information is necessary to describe the cumulative effects of all past
6 actions combined.”). Further, in examining the cumulative effects of past actions,
7 an agency can “aggregate[e] the cumulative effects of past projects into an
8 environmental baseline, against which the incremental impact of a proposed
9 project is measured.” *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d
10 1105, 1111 (9th Cir. 2015). Plaintiff thus misapprehends NEPA’s requirements,
11 and the Sanpoil Project properly addressed cumulative effects on recreation.

12 **2. The Forest Service Also Assessed the Effect on Endangered
13 and Sensitive Species.**

14 Plaintiff also seeks to challenge the Forest Service’s cumulative effects
15 analysis for wildlife, contending that the Service does not have a complete census
16 for wildlife. Pl.’s S.J. at 27. True, the Service lacks this information because
17 “[a]ccurate estimates of wildlife populations relative to the project area are difficult
18 if not unfeasible to obtain.” AR_06286. And this, in turn, “is due to the limitations
19 of detection methods and the level of effort and time that would be required for a
20 complete census.” *Id.* But this reality is not a ground to invalidate the Forest
Service’s cumulative effects analysis, as Plaintiff suggests in its motion.

1 “[G]eneral statements about possible effects and some risk” may suffice
2 when “more definitive information” is unavailable. *Ocean Advocates v. U.S. Army*
3 *Corps of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005); *see also Kleppe*, 427 U.S. at
4 414 (“[P]ractical considerations of feasibility might well necessitate restricting the
5 scope of comprehensive statements.”). And in any event, “[l]acking complete
6 information on species distributions and abundance, when habitat occurs on which
7 a species depends, [the Forest Service] generally consider[s] the habitat as
8 potentially occupied.” AR_06286. Given that a complete census was not feasible,
9 the Forest Service thus took a conservative approach to cumulative effects on
10 wildlife, considering habitat to be occupied.

11 Plaintiff misreads the Forest Service’s 2018 cumulative effects report for the
12 gray wolf prepared in connection with the Forest Plan revision, contending that the
13 report indicates that areas “impacted by timber harvest and grazing” will adversely
14 impact gray wolf habitat, contrary to the conclusion the Forest Service reached in
15 the EA. *See* Pl.’s S.J. at 28 (citing FP_102064). In fact, the 2018 Forest-wide Gray
16 Wolf Report recognized Forest-wide management under the Plan, including the
17 vegetation management here, would “result in a high likelihood of maintaining the

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1 viability of gray wolves on the [CNF].” FP_102605-102066. The plan-level and
2 project-level conclusions are thus in full accord.⁷

3 Nor are additional grazing areas of concern in the Sanpoil Project. As
4 explained above, the Project would produce better, not more, grazing area in the
5 Quartz allotment. AR_05491; AR_06054. The Forest Service’s cumulative effects
6 analysis is thus fully supported by the administrative record.

7 Plaintiff also challenges the Forest Service’s cumulative effects analysis for
8 the wolverine, questioning the agency’s conclusion that the Project is “not likely to
9 jeopardize the existence of wolverines.” Pl.’s S.J. at 29-30; AR_06044. But that
10 conclusion was fully supported by the Forest Service’s Biological Evaluation for
11 the Project, which concluded that [1] the Project would create openings in the
12 forest canopy that could enhance forage production for wolverines; [2] while other
13 on-going projects, including the Sherman Pass Project, *see* AR_05537-38
14 (Appendix B, Table 11 and 12) could disturb and displace a wolverine from a
15 foraging or resting site, they but will not have a significant impact to the
16 population as a whole; [3] wolverine travel corridors would remain intact; and [4]

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19 ⁷ Plaintiff also questions why the Forest Service references its grizzly bear
20 analysis in its cumulative effects analysis for wolves and wolverines. Pl.’s S.J. at
28. The agency did so because grizzly bears and wolves both prey on big game.
AR_05449; AR_02949. Both prey on, and eat carcasses of, young ungulates.
AR_05449; AR_02949.

1 the Project's impact on wolverine habitat will be temporary and moderate.

2 AR_05531.

3 Plaintiff also challenges the Forest Service's cumulative effects analysis for
4 the little brown bat and the Townsend big-eared bat, asserting again that the
5 agency cannot act without a complete census of where bats live and claiming that
6 the Project would remove bat roost sites. Pl.'s S.J. at 31. Again, the Forest Service
7 is not required to complete a detailed census when undertaking a cumulative
8 effects analysis. Contrary to Plaintiff's contention, moreover, the Forest Service
9 knows "where these bats live." Pl.'s S.J. at 31. Townsend's big-eared bat
10 "hibernate and roost in caves of mine adits"; and its nursing colonies are typically
11 located in sites above 50 degrees, such as old abandoned buildings. AR_06260.
12 Little brown bat similarly roost and nurse in structures such as caves, the hollows
13 of trees, mines, abandoned buildings, and bridges. AR_06299. The Forest Service
14 concluded that the proposed activities may impact individual bats but are not likely
15 to result in a trend toward Federal listing or loss of viability. AR_06046. The
16 Service reached that determination because "activities would either be far enough
17 removed from [these] known bat roost sites to have no effect on [the bat] species or
18 would be timed to avoid periods that the sites would be occupied." *Id.* The
19 determination is thus fully explained and supported in the record.

1 Lastly, Plaintiff asserts that the Forest Service failed to adequately assess the
2 cumulative impact of the Project on sensitive birds and invertebrate species. Pl.’s
3 S.J. at 31-32. Plaintiff asserts that “[t]he EA fails to engage in any meaningful
4 analysis of cumulative effects to the goshawk.” *Id.* at 31. But that analysis is in the
5 Forest Service’s Biological Evaluation. AR_06305. Plaintiff also asserts that the
6 EA failed to assess the cumulative effects of the Project on invertebrate species
7 such as Western bumblebee. Pl.’s S.J. at 32. But that information, too, is readily
8 found in the Biological Evaluation. AR_06311. The record includes more than the
9 EA. *See Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534,
10 1548 (9th Cir. 1993) (“Section 706 of the APA provides that judicial review of
11 agency action shall be based on ‘the whole record.’ ‘The whole record’ includes
12 everything that was before the agency pertaining to the merits of its decision.”).

13 Federal Defendants are entitled to summary judgment on Claim One of the
14 Amended Complaint that relies upon Plaintiff’s cumulative effects arguments.

15 **C. The Forest Service’s FONSI was not Arbitrary or
16 Capricious.**

17 Finally, Federal Defendants are also entitled to summary judgment on Claim
18 Three of the Amended Complaint that asserts that the Forest Service’s FONSI was
19 arbitrary and capricious. The FONSI is well supported by the Project record and
20 the EA—and well within the Forest Service’s discretion under NEPA to make.

1 Under NEPA, “an agency may prepare an EA to decide whether the
2 environmental impact of a proposed action is significant enough to warrant
3 preparation of an EIS.” *Blue Mountains Biodiversity Project*, 161 F.3d at 1212.
4 “Whether an action ‘significantly’ affects the environment requires analyzing both
5 ‘context’ and ‘intensity.’” *Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir.
6 2017) (citing 40 C.F.R. § 1508.27). “Context refers to the setting in which the
7 proposed action takes place[.]” *Ocean Advocates v. U.S. Army Corps of Engineers*,
8 402 F.3d 846, 865 (9th Cir. 2005) (citing 40 C.F.R. § 1508.27(a)). “Intensity,”
9 meanwhile, means ‘the severity of the impact’” under NEPA’s implementing
10 regulations. *Id.*

11 “[T]he regulations identify ten factors that agencies should consider in
12 evaluating intensity.” *In Def. of Animals, Dreamcatcher Wild Horse & Burro
Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014) (citing 40
14 C.F.R. § 1508.27(b)(1)-(10)). Under the APA’s standard of review, an agency’s
15 finding of no significant impact is subject to deference, *Wild Fish Conservancy v.
Nat’l Park Serv.*, 687 F. App’x 554, 557 (citing *Marsh v. Oregon Natural
Resources*, 490 U.S. 360, 376-77), and “may be overturned only if it is ‘arbitrary,
18 capricious, an abuse of discretion, or otherwise not in accordance with law,’”
19 *Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004) (quoting *Native Ecosystems
Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002)).

1 Because the Forest Service’s FONSI was fully supported by the EA and
2 record, including specialists reports for the Project, it is subject to deference, and is
3 not arbitrary or capricious. *See Env’tl. Prot. Info. Ctr. V. U.S. Forest Serv.*, 451
4 F.3d 1005, 1015 (finding agency’s analysis of environmental impacts with
5 protection and monitoring measures in place constituted “the requisite ‘hard look’
6 at the Project’s environmental consequences, and it was not arbitrary and
7 capricious for [the agency] to determine that the impacts would not be significant
8 with these mitigation measures in place.”); *BARK v. Northrop*, 607 F. App’x 652,
9 655 (9th Cir. 2015) (finding agency “reasonably relied on its own expert reports
10 and technical expertise in concluding that the impact of the project would be
11 insignificant.”).

12 Plaintiff’s one paragraph attempt to challenge the Service’s FONSI fails to
13 carry its burden under the APA’s deferential standard of review. Pl.’s S.J. at 39-40.
14 Stripped of its arguments that the Forest Service was required to disclose “site
15 specific” prescriptions and that the agency allegedly failed to assess the cumulative
16 effects of the Project, which, as explained, have no merit, Plaintiff is left to rest on
17 other arguments. Plaintiff argues that the Project presents potential significant
18 environmental impacts warranting an EIS because it will allegedly result in [1]
19 uncertain impacts; [2] impact the Inventoried Roadless Rule area (“IRA”); and [3]
20

1 set a precedent for future projects. *Id.* None of Plaintiff's arguments, however,
2 have any merit.

3 Regarding uncertainty, agencies must consider “[t]he degree to which the
4 effects on the quality of the human environment are likely to be highly
5 controversial.” 40 C.F.R. § 1508.27(b)(4). Effects are likely to be highly
6 controversial if there is “a substantial dispute [about] the size, nature, or effect of
7 the major Federal action rather than the existence of opposition to a use.” *Barnes v.*
8 *FAA*, 865 F.3d 1266, 1275 (9th Cir. 2017) (quoting *Blue Mountains Biodiversity*
9 *Project*, 161 F.3d at 1212) (alteration in original) (internal quote omitted). “A
10 substantial dispute exists when evidence . . . casts serious doubt upon the
11 reasonableness of an agency’s conclusions.” *In Def. of Animals*, 751 F.3d at 1069
12 (internal quote omitted). Not only does Plaintiff fail to present any “evidence” of
13 uncertainty, Plaintiff fails to even address the specialist reports, EA, and
14 DN/FONSI that found no uncertainty. *See* Pl.’s S.J. at 40 (resting instead on
15 conclusory parenthetical statements of significance, but nothing more).

16 Agencies must also consider “[t]he degree to which the possible effects on
17 the human environment are highly uncertain or involve unique or unknown risks.”
18 40 C.F.R. § 1508.27(b)(5). This does not mean, however, that an EIS is required
19 “anytime there is some uncertainty”; ‘only if the effects of the project are ‘highly’
20 uncertain’ is this intensity factor implicated. *In Def. of Animals*, 751 F.3d at 1070

1 (internal quote and citation omitted). And the Service determined that there is
2 nothing about the Project’s restorative treatments that are somehow “highly
3 uncertain” or “highly controversial” within the meaning of the intensity factors
4 Plaintiff invokes.

5 Again, Plaintiff fails to point to anything in the record that would carry its
6 burden of showing that the agency’s determination was arbitrary and capricious.
7 Plaintiff instead attempts to (again) argue that the Forest Service was required to
8 have provided “site-specific,” tree-by-tree prescriptions for the Project. Pl.’s S.J. at
9 40. But *Barnes*, which Plaintiff attempts to cite for the proposition that the Forest
10 was required to do so, did not even address that issue. See Pl.’s S.J. at 40 (citing
11 *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011)).

12 Further, the passage in *Barnes* Plaintiff quotes in purported support of its
13 contention that the Forest Service was required to assess tree-by-tree prescriptions,
14 comes from *Native Ecosystems Council*. See *Barnes*, 655 F.3d at 1140 (quoting
15 *Native Ecosystems Council v. U.S. Dep’t of Transp.*, 428 F.3d 1233, 1240 (9th Cir.
16 2005)). There, the Court made clear the heavy burden Plaintiff shoulders in
17 attempting to show that a Project is highly uncertain or controversial enough to
18 require an EIS. Even the mere “presence of negative effects,” the Court
19 recognized, is not enough to make a Project “highly controversial” or “highly
20 uncertain.” *Native Ecosystems Council*, 428 F.3d at 1240 (quote and citation

omitted). “Not only would such a standard deter candid disclosure of negative information,” contrary to NEPA’s purpose, it would mean that the mere “presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment,” which does not “follow[.]” *Id.* Native Ecosystems Council thus highlights the shortcomings in Plaintiff’s argument.

The Court should also reject Plaintiff’s argument that the treatments in the IRA warrants an EIS. *See* Pl.’s S.J. at 40 (alleging significance because vegetation treatments would occur “within Roadless Areas.”). Plaintiff seeks to invoke the third intensity factor, which provides for consideration of the “[u]nique characteristics of the geographic areas such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). Again, the Service fully considered the Project’s impact on the IRA in the EA and record. AR_06010-11; AR_06056-57; AR_05325; AR_5331-33; AR_06023; AR_06228; AR_06231-32; AR_06233-37. Based upon this thorough review, the Forest Service concluded that the Project’s treatments in the IRA would not require it to prepare an EIS. Plaintiff’s claim thus fails under the APA’s deferential standard of review.⁸

⁸ Plaintiff also asserts that the Project “proposes treatments next to and within” the recommended wilderness area. Pl.’s S.J. at 40. But the Forest is not proposing activity within the recommended wilderness area. AR_05948-49; AR_05899-5901; AR_06340-6360; AR_06806. The Court should reject Plaintiff’s suggestion to the contrary.

Finally, Plaintiff’s suggestion that the Project sets a precedent for future actions fails as a matter of law under Ninth Circuit precedent. Pl.’s S.J. at 40. In *Barnes*, the Ninth Circuit recognized that “EAs are usually highly specific to the project and the locale, thus create[e] no binding precedent” for future projects. 655 F.3d at 1140; *see also Anderson*, 371 F.3d at 493 (precedential factor is generally insufficient to demonstrate a significant environmental impact).

7 Federal Defendants are thus also entitled to summary judgment on the Third
8 Claim the Amended Complaint that relies upon these arguments in seeking to
9 require that the agency prepare a time-consuming EIS in assessing the Project.

CONCLUSION

11 Based on the foregoing, the Service complied with NFMA, NEPA, and the
12 APA in revising the Forest Plan and in issuing the DN/FONSI for the Sanpoil
13 Project. Accordingly, the Court should grant judgment to Federal Defendants.

14 | Dated: November 10, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I electronically filed and served the foregoing on all counsel of record *via* the CM/ECF system.

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